

## The Differing Site Conditions Clause – Careful!

**Executive Summary.** For underground contractors the differing site conditions (“DSC”) clause can be a savior, or a killer. Know what it says before you bid the job – it has a direct effect on your cost estimate.

**What is a differing site conditions clause?** This is contract language addressing a physical condition discovered by the Contractor during performance of the work that was not adequately described in the Contract Documents prior to the bid. Some examples could include (and have, in my career):

Contract Documents Show	Actual Field Conditions Show	Impact to Contractor
No groundwater in the excavation.	Groundwater encountered in the excavation.	Time and cost impacts to manage groundwater.
No hard rock in the excavation.	Hard rock encountered in the excavation.	Time and cost impacts to manage hard rock excavation.
Dirt in the excavation.	Trash and debris (conditions comparable to a landfill) in the excavation.	Time and cost impacts resulting from underground debris. Impacts include time and cost from lost production and disposal fees.

**The history of the DSC clause.** Early in the 20<sup>th</sup> century, the federal government realized that they were overpaying on bid day for potential differing site conditions. This meant that if the drawings showed that pipe would be installed in soft

dirt, but that rock showed up out of nowhere, the Contractor was going to have to eat this “changed condition” in its entirety. So back then, at bid time, the Contractors typically added in an amount of money to cover this risk. The war room/bid room discussion DSC went like this: “well, the borings show that we’re only

*In 1926, the Federal Board of Contracts and Adjustments required the inclusion of a DSC clause in all Federal construction contracts. The Board’s action was taken to reduce or eliminate the contingency factor for subsurface conditions and to limit the latent costs incurred by contractors for pre-bid subsurface explorations.*

*- U.S. DEPARTMENT OF TRANSPORTATION FEDERAL HIGHWAY ADMINISTRATION GEOTECHNICAL ENGINEERING NOTEBOOK  
Geotechnical Guideline No. 15*

going to hit a low blow count silty sand everywhere, but we were near there five years ago and it was blue rock. Add in \$100,000 to deal with that section of drain line between stations 12+00 to 24+00...if we hit rock we're covered, if we don't hit it we pocket the \$100k."

**Why do I care about a DSC now, it's the 21<sup>st</sup> century?** Not all contracts are the same. If you encounter a DSC in the field, this event may or may not be compensable in time and/or cost. Although a vast majority of public contracts have favorable language to the Contractor in allowing time and cost relief, not all do. And who knows what your private contracts say.

Most public contracts have something like this, where the Contractor is protected in time and cost by the Contract:

- A. Notification. The Contractor shall promptly, and before such conditions are disturbed, notify the procurement officer of:
- i. Subsurface or latent physical conditions at the site differing material from those indicated in this contract; or
  - ii. Unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inherent in work of the character provided for in this contract.
- B. Adjustment of price or time for performance. After receipt of the notice, the procurement officer shall promptly investigate the site, and if it is found that the conditions do materially so differ and cause an increase in the Contractor's cost of, or the time required for, performance of any part of the work under this contract, whether or not changed as a result of the conditions, an adjustment shall be made and the contract modified in writing accordingly. Any adjustment in contract price made pursuant to this clause shall be determined in accordance with the price adjustment clause of this contract, Section 3.11, "Price Adjustment in Construction Contracts" of the GENERAL CONDITIONS.

The above language is good – it allows the Contractor to call out this changed condition, the Owner is then required to investigate the matter and then adjust the Contract accordingly in "price or time".

Now flip the coin. The language below was taken from a different public entity's general terms and conditions. Notice that





the risk of DSCs is “wholly” on the Contractor:

Differing Site Conditions – Contractor's Responsibility. The Contractor accepts the conditions at the construction site as they eventually may be found to exist and warrants and represents that the contract can and will be performed under such conditions, and that all materials, equipment, labor, and other facilities required because of any unforeseen conditions (physical or otherwise) shall be wholly at the Contractor's own expense, anything in this contract to the contrary notwithstanding.

The difference in the purple language, as compared to the yellow language, could be catastrophic to a Contractor.

**My story.** As an underground contractor for 26 years and a claims consultant and owner's representative for almost 10 years, this issue is not uncommon. A geotechnical engineer's role of defining soil conditions is very difficult. And a successful contractor will expose any minor differences between the Contract and in-situ conditions.

My old boss from the late 1990s used to joke about silty sand and sandy silt – he was a master of arguing the DSC. I guess some of that must have rolled off onto me as our firm deals with this quite a bit as well, both in defending an owner and as fighting for the Contractor.

Work safe!



**Bonus.** Here's a great write-up on differing site conditions by one of the best construction lawyers in the country, give it a read ([www.smithcurrie.com/publications/common-sense-contract-law/back-basics-differing-site-conditions/](http://www.smithcurrie.com/publications/common-sense-contract-law/back-basics-differing-site-conditions/)).